FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, ET AL., APPELLANTS

v.

JOHN E. WHITE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

PETER BUSCEMI,
Assistant to the Solicitor General,

BRIAN K. LANDSBERG,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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INTEREST OF THE UNITED STATES

In areas covered by Section 4 of the Voting Rights Act of 1965, 79 Stat. 438, as amended, 42 U.S.C. (and Supp. V) 1973b, Section 5 of the Act, 79 Stat. 439, as amended, 42 U.S.C. (Supp. V) 1973c, provides that changes in voting standards, practices, and procedures may not become effective until they have been precleared by the Attorney General or the United States District Court for the District of Columbia.

Under Section 12(d) of the Act, 79 Stat. 444, as amended, 42 U.S.C. 1973j(d), the Attorney General is authorized to bring suit to enjoin the enforcement of a voting change that should have been submitted for preclearance but was not. Accordingly, the Attorney General has a substantial interest in the compass of Section 5, as to both the kinds of governmental entities required to submit voting changes for preclearance and the kinds of governmental action that may affect voting in such a way as to be subject to preclearance.

QUESTIONS PRESENTED

1. Whether a rule requiring board of education employees to take unpaid leaves of absence while they campaign for or serve in elective political office is a "standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act of 1965.

2. Whether voting changes adopted by a county board of education in a state designated for coverage under Section 4 of the Act must be precleared under Section 5 before they may become effective.

STATEMENT

The facts in this case are essentially undisputed (see Answer of Defendants (A. 8a-10a); Brief for Appellants 8-11). In May 1972, appellee, a black employee of appellant Dougherty County Board of Education, announced his intention to run for a seat

in the Georgia House of Representatives (A. 31a). He has since alleged that he was the first black to seek election to that office from Albany, Georgia (A. 4a). On June 12, 1972, a few weeks after appellee's public announcement of his candidacy, his employer, the Board of Education, adopted Rule 58, which provides (A. 18a, 32a):

> Political Office. Any employee of the school system who becomes a candidate for any elective political office, will be required to take a leave of absence, without pay, such leave becoming effective upon the qualifying for such elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto.

In June 1972, appellee qualified, under Georgia election law, as a candidate for the Democratic primary. He was immediately required, under the newly-adopted Rule 58, to take a leave of absence without pay. Appellee was defeated in the primary election in August 1972 and thereafter returned to his employment with the Board of Education (A. 24a, 32a). In June 1974, appellee again qualified as a candidate for the Georgia House of Representatives. In August of that year, he won the Democratic primary and, in November, the general election. Under Rule 58, appellee was required to take an unpaid leave of absence from June 12, 1974 through November 18, 1974; he was reinstated to his employment with the Board of Education nearly two weeks after the November 5 election (A. 32a). In June 1976, appellee qualified as

a candidate to retain his seat in the state legislature. Under Rule 58, he took an unpaid leave of absence from the date of his qualification on June 8, 1976, through his Democratic primary victory in August 1976. When it became clear that appellee would be unopposed for reelection in November, he was reinstated to his employment with the Board of Education on September 8, 1976 (*ibid.*).[1]

On June 11, 1976, appellee brought this suit, alleging that Rule 58 was a "standard, practice, or procedure with respect to voting" that had been instituted by appellants without the preclearance required by Section 5 of the Voting Rights Act and that the Rule was therefore unenforceable (A. 5a). A three-judge district court was convened. See *Allen* v. *State Board of Elections*, 393 U.S. 544, 563. The court held that Rule 58 should have been submitted for preclearance under Section 5. Relying on this Court's decisions in *Allen* and in *Georgia* v. *United States*, 411 U.S. 526, the court characterized Section 5 as "an all encompassing protection against abridgement of an *effective* vote" (A. 35a). In particular, the court said, Section 5 applies to any "modification[] of the political process * * * which restricts the ability of citizens to run for office" (*ibid.*). The court reasoned that

[1] The Georgia General Assembly sits for approximately two and a half months at the beginning of each year. Although not reflected in the record, appellee apparently was required to take unpaid leaves of absence from his Board of Education employment during his service at the 1975, 1976, 1977, and 1978 legislative sessions.

"[b]y imposing a financial loss on [Board of Education] employees who choose to become candidates, [Rule 58] makes it more difficult for them to participate in the democratic process and, consequently, restricts the field from which the voters may select their representatives" (*ibid.*). On this basis, the court concluded that Rule 58 should have been submitted for preclearance. Because of appellants' failure to make such a submission and obtain preclearance from the Attorney General or the United States District Court for the District of Columbia, the court enjoined further enforcement of Rule 58.

SUMMARY OF ARGUMENT

Rule 58 is a "standard, practice, or procedure with respect to voting" and therefore must be submitted for preclearance under Section 5 of the Voting Rights Act. This Court has held that Section 5 applies to changes affecting candidate qualification (see *Allen* v. *State Board of Elections*, 393 U.S. 544; *Hadnott* v. *Amos*, 394 U.S. 358), and Congress has approved that interpretation in its most recent extension of the Act. S. Rep. No. 94-295, 94th Cong., 1st Sess. 16-17 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 9-10 (1975).

Although the Attorney General, in executing his responsibilities under the Act, has had little experience with provisions like Rule 58, and although in most circumstances the Attorney General might well interpose no objection to such a rule, any provision

affecting the requirements for candidacy should be subject to preclearance under Section 5. Rule 58 erects financial barriers to employees of appellant Board of Education who may wish to seek elective office and thus has a potential effect on the choices actually presented to the voters. Accordingly, the rule must be submitted for preclearance, regardless of appellants' estimate of the probability that the Attorney General will not object to its enforcement.

Whatever may be the situation in this case, there exists at least the possibility that rules like Rule 58 may have a racially discriminatory purpose or effect. If the percentage of black professionals employed by a school board or other public entity is substantially higher than the percentage of white professionals employed by the same body, a rule restricting the political activity of the body's employees may have a disportionate impact on blacks. Moreover, the timing of Rule 58's adoption in this case—less than a month after appellee announced his candidacy for the state legislature—suggests that a racially motivated board of education could use such a rule to discourage black employees from running for office. Because a rule like Rule 58 could have the purpose or effect of "abridging the right to vote on account of race or color" and thereby restricting black access to the political process, such a rule is a "standard, practice, or procedure with respect to voting" within the meaning of the Act and should be submitted for preclearance under Section 5.

2. Appellant Board of Education is a political unit within a state covered by Section 4 of the Voting Rights Act and therefore must obtain preclearance under Section 5 when it adopts a change that affects voting. This Court held in *United States* v. *Board of Commissioners of Sheffield, Alabama*, No. 76-1662, decided March 6, 1978, that in states covered under Section 4, the preclearance requirements of Section 5 apply to all voting changes adopted by "political units that may exercise control over critical aspects of the voting process" (slip op. 15). Appellants seek to distinguish that case on the ground that, unlike the City of Sheffield, appellant Board of Education "has no direct or indirect functions in connection with election of public officers" (Br. 15). But whether a political unit itself conducts elections is essentially irrelevant to the purposes of Section 5. The critical factor is control over the electoral process.

In adopting Rule 58 and establishing disincentives to its employees' participation in political campaigns, appellant Board of Education demonstrated and exercised its ability to influence the identity of the candidates for the state legislature from Dougherty County. The district court correctly held that this practical effect was sufficient to require that Rule 58 be submitted for preclearance under Section 5. Any other result would create a possibility that the provisions of the Act could be circumvented merely by delegation of control over various aspects of the electoral system to a political entity that does not itself con-

duct elections. Such a development would run counter to the purpose, legislative history, and judicial interpretations of Section 5, and should not be permitted by this Court.

ARGUMENT

I

RULE 58 IS A "STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING" AND THEREFORE IS SUBJECT TO THE PRECLEARANCE REQUIREMENTS OF SECTION 5

Section 5 of the Voting Rights Act of 1965 requires that, in states or political subdivisions covered by Section 4(b) of the Act, new standards, practices, or procedures with respect to voting may not become effective unless they have been precleared by the United States District Court for the District of Columbia or the Attorney General. Congress has expansively defined the term "voting," as it is used in the statute. Section 14(c)(1) of the Act, 79 Stat. 445, 42 U.S.C. 1973*l*(c)(1), provides that voting "shall include all action necessary to make a vote effective in any primary, special, or general election * * *." Neither Section 5 nor Section 14 nor any other portion of the statute, however, elaborates on the meaning of the phrase, "standard, practice, or procedure with respect to voting."

In upholding the constitutionality of the Voting Rights Act, this Court declared that Congress had designed the statute "to banish the blight of racial discrimination in voting, which has infected the elec-

toral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308. Three years later, in *Allen* v. *State Board of Elections*, 393 U.S. 544, 563-571, the Court grappled for the first time with the basic question presented here, namely, what sort of measures did Congress intend to embrace within the words "standard, practice, or procedure with respect to voting." *Allen* held that the critical language of Section 5 should be broadly construed in order to effectuate the "articulated purposes of the legislation" (393 U.S. at 570). The Court stated that "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way" (*id.* at 566).

Appellees in the three Mississippi cases consolidated with *Allen* argued that Section 5 should not be read to cover "state rules relating to the qualification of candidates" (393 U.S. at 564). (*Whitley* v. *Williams*, one of the consolidated cases, involved four state statutory revisions that made qualification as an independent candidate substantially more difficult.) In rejecting appellees' argument, the Court stressed that the Voting Rights Act "was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race" (*id.* at 565). By placing additional obstacles in the path of prospective independent candidates, the Court reasoned, the changes at issue in

Whitley might "undermine the effectiveness" of voters who wish to elect persons not affiliated with any political party (*id.* at 570). Accordingly, the Court determined that further enforcement of the disputed statutory revisions should be enjoined pending their submission and preclearance under Section 5.

In the 1975 extension of the Voting Rights Act, Congress expressly approved *Allen* and the broad interpretation it gave to the scope of Section 5. See S. Rep. No. 94-295, 94th Cong., 1st Sess. 16 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 9 (1975). Both the House and Senate Judiciary Committees were aware that preclearance had been required for changes affecting candidate qualification and both committees specifically mentioned increased candidate filing fees as an example of the kind of change to which the Attorney General had interposed an objection. S. Rep. No. 94-295, *supra*, at 17; H.R. Rep. No. 94-196, *supra*, at 10. Moreover, both committees relied heavily on the 1975 report of the United States Commission on Civil Rights entitled *The Voting Rights Act: Ten Years After*. That report (at 131-203) documented at length the problems faced by minority candidates who had attempted to qualify for office.

In cases decided after *Allen*, this Court and other federal courts have adhered to the principle that changes affecting prerequisites for candidacy must be submitted for preclearance under Section 5. For example, in *Hadnott* v. *Amos*, 394 U.S. 358, the Court considered a newly-enacted Alabama law that required

prospective independent candidates to declare their intention to seek public office more than two months earlier than previously necessary. Finding the controlling question indistinguishable from that presented in *Whitley*, the Court held that the new statute could not be enforced until precleared under Section 5 (394 U.S. at 366). Similarly, three-judge district courts in *Waide* v. *Waller*, 402 F. Supp. 922, 924-925 (N.D. Miss.), and *United Ossining Party* v. *Hayduk*, 357 F. Supp. 962, 966 (S.D. N.Y.), concluded that the requirements of Section 5 apply to changes in the standards governing qualification as a political candidate.[2] The *Waide* court declared (402 F. Supp. at 925):

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[2] The Mississippi law at issue in *Waide* required that an attorney be admitted to practice before the state supreme court for a period of two years before he could seek election as a local district attorney. Although enacted in 1966, the statute had not been submitted for preclearance at the time Waide filed his complaint in 1975. During litigation in the district court, Mississippi submitted the statute to the Attorney General under Section 5. Seventeen days before the district court issued its opinion and judgment, the Attorney General notified the court by telegram that he would interpose no objection to the law. 402 F. Supp. at 925.

United Ossining Party involved a New York law that placed certain restrictions on cross-endorsements of candidates for public office. The challenged amendment to New York's Election Law provided that "no candidate for an office other than a judicial or statewide office shall be eligible to receive the nomination and to appear on the ballot as the candidate of both a political party and an independent group or body" (357 F. Supp. at 964). The court held that the new statute could not be enforced because it had not been precleared under Section 5 (*id.* at 966).

> A statute which makes more stringent the requirements for political candidacy and thus limits to some extent the electorate's ability to choose does impact on voting rights in a fashion within the contemplation of § 5, and is, therefore, subject to § 5 provisions.

The decisions in *Hadnott*, *Waide*, and *United Ossining Party* are part of a substantial body of precedent that has implemented a broad construction of Section 5 in response to the guidance provided by this Court in *Allen*. The preclearance requirements of Section 5 have been applied not only to changes affecting candidate qualification, but also to reapportionment plans (*Georgia* v. *United States*, 411 U.S. 526), changes in municipal boundaries through annexations of adjacent areas (*Perkins* v. *Matthews*, 400 U.S. 379, 388-390; see also *City of Richmond* v. *United States*, 422 U.S. 358), changes in the location of polling places (*Perkins* v. *Matthews*, *supra*, 400 U.S. at 387-388), and a wide variety of miscellaneous alterations in existing practices such as the procedures for casting a write-in vote, the permissibility of sample ballots in the voting booth, and the size of the vote required for election. See, *e.g.*, *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 552-553, 570; *Gilmore* v. *Greene County Democratic Party Executive Committee*, 435 F. 2d 487 (C.A. 5); *United States* v. *Cohan*, 358 F. Supp. 1217 (S.D. Ga.). The expansive interpretation of the statutory phrase, "standard, practice, or procedure with respect to voting," reflects this Court's admonition that "Section 5

is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters." *Georgia* v. *United States*, *supra*, 411 U.S. at 531.

The Attorney General's regulations under Section 5, adopted in 1971, also take an inclusive approach to the kind of changes covered by the statute. See 28 C.F.R. Part 51. The regulations state that "[a]ll changes affecting voting, even though the change appears to be minor or indirect," are subject to preclearance under Section 5. 28 C.F.R. 51.4(a). In particular, the Attorney General has specified that "[a]ny alteration affecting the eligibility of persons to become or remain candidates or obtain a position on the ballot in primary or general elections or to become or remain officeholders * * *" (28 C.F.R. 51.4 (c)(4)) and "[a]ny change in the eligibility and qualification procedures for independent candidates" (28 C.F.R. 51.4(c)(5)) must be submitted for prior approval. This Court has stated that the Attorney General's interpretation of the Voting Rights Act is "persuasive evidence of the original understanding, especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." *United States* v. *Board of Commissioners of Sheffield, Alabama*, No. 76-1662, decided March 6, 1978, slip op. 19-20. See also *Perkins* v. *Matthews*, *supra*, 400 U.S. at 390-394.

In carrying out his administrative and enforcement responsibilities under the Voting Rights Act,

the Attorney General has had little experience with provisions such as appellant Board of Education's Rule 58, at issue in this case.[3] Although Department of Justice records show that numerous changes affecting candidate qualification have been submitted to the Attorney General for preclearance, none of these submissions involved a state or local rule that imposed restrictions on the political activity of government employees. At least one state, after the effective date of its coverage under Section 4 of the Voting Rights Act, has enacted a law limiting political activity by employees included within the state's merit system. See Ga. Code Ann. § 40-2205 (1975 Rev.). This statute, in effect a state counterpart to the federal Hatch Act, 5 U.S.C. 7324, creates the position of State Commissioner of Personnel Administration and requires the Commissioner to submit to the Governor rules and regulations that "define and prohibit improper political activity" by state employees. Such regulations have apparently been submitted to and approved by the Governor (see *Herault* v. *Department of Human Resources*, 137 Ga. App. 446, 224 S.E. 2d 480), but neither the statute nor the regulations have

[3] Rule 58 came to the attention of the Department of Justice shortly before the commencement of this litigation when counsel for appellee contacted attorneys in the Voting Section of the Civil Rights Division. On August 26, 1976, two and a half months after appellee filed his complaint, Assistant Attorney General Pottinger wrote to the Superintendent of the Dougherty County School System and informed him that Rule 58 should be submitted for preclearance under Section 5 (A. 28a).

been submitted for preclearance under Section 5 and the Attorney General has not sought to enjoin enforcement of the political activity rules pending federal review.

This Court has expressed constitutional approval of the Hatch Act and of similar provisions in state law. See *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548; *Broadrick* v. *Oklahoma*, 413 U.S. 601; *United Public Workers of America (C.I.O.)* v. *Mitchell*, 330 U.S. 75. Save for the allegations in the present controversy, we are unaware of any suggestion in a litigated case that limitations on public employees' political activity serve to reduce minority access to the political process. Accordingly, it may fairly be supposed that, in the absence of special circumstances, state statutes or local rules like the one currently in dispute would be found not to have the purpose or effect of "denying or abridging the right to vote on account of race or color" and would therefore be precleared by the Attorney General if submitted under Section 5.

In attempting to establish that Rule 58 is not subject to preclearance under Section 5, appellants argue that the rule is "a means of getting a full days work for a full days pay—nothing more and nothing less" (Br. 20). But the fact remains that Rule 58 singles out political candidacy for special treatment; it is not a neutrally drawn, generally applicable work rule concerning absenteeism that equally affects political or

non-political activities. And, as this Court has frequently observed, the worthiness of a particular change with respect to voting or the likely fate of that change once submitted for preclearance is essentially irrelevant to the question whether the change must be submitted in the first place. See, *e.g.*, *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 571; *Georgia* v. *United States*, *supra*, 411 U.S. at 534.

Regardless, therefore, of whether the Attorney General would interpose an objection if Rule 58 were submitted to him under Section 5, appellants remain obligated to make such a submission. Furthermore, that obligation has not been suspended by the failure of the Attorney General to initiate Section 5 enforcement proceedings with respect to other comparable provisions not submitted for preclearance. As this Court recognized in *Perkins* v. *Matthews*, *supra*, 400 U.S. at 391-392 n. 10, "Section 5 was enacted in large part because of the acknowledged and anticipated inability of the Justice Department—given limited resources—to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act. * * * For that reason, § 5 places the burden on the affected polities to submit all changes for prior approval."

Rule 58 is subject to the preclearance requirements of Section 5 because it imposes financial burdens on a particular group of prospective political candidates and thereby discourages members of that group from running for elective office. By erecting an additional barrier to the candidacy of board of education em-

ployees, the rule tends to restrict entry into political campaigns and thus to limit the choices available to Dougherty County voters. As the district court held (A. 35a), Section 5

> applies to modifications of the political process and all that that process entails, including the implementation of any policy * * * which restricts the ability of citizens to run for office.
>
> Rule 58 of the Dougherty County Board of Education is such a modification of the political process. By imposing a financial loss on its employees who choose to become candidates, it makes it more difficult for them to participate in the democratic process and, consequently, restricts the field from which the voters may select their representatives. As in *Allen*, *supra*, and *Hadnott*, *supra*, it is an "increased barrier" for a candidate and for that reason it is a "procedure with respect to voting" that is subject to the requirements of Section Five.

While it may be true, as suggested above, that the vast majority of provisions like Rule 58 would not prompt objection by the Attorney General, such rules do contain at least the potential for abuse. If, for example, black candidates are significantly more likely than white candidates to be drawn from the ranks of public employees, a provision like Rule 58 may place blacks at a substantial competitive disadvantage in seeking elective office and may seriously diminish citizens' opportunities to vote for black candidates. Indeed, in this case, appellee has presented census

statistics that indicate that black elementary and secondary school teachers comprise approximately 54 percent of all black professionals in Georgia, while white teachers comprise only slightly more than 21 percent of white professionals in the state. See Brief for Appellee 7 n. 5. A rule that discourages teachers from running for political office may thus have a disproportionate impact on the pool of potential black candidates.[4]

The timing of Rule 58's adoption also suggests the possibility that such a rule may be used for a racially discriminatory purpose. Appellant Board of Education adopted Rule 58 less than one month after appellee announced his candidacy for the state legislature. Appellee was the first black in recent years to seek election to that office from Dougherty County.[5] It is at least possible that, in imposing the unpaid leave of absence requirement on employees running for political office, the Board acted with the specific purpose of deterring appellee from continuing his campaign and that its reasons for doing so were related in part to appellee's race rather than his status as an employee. Appellee has alleged that he was the first employee of appellant Board of Education to seek elective office (Br. for Appellee 6 n. 5). Thus, it does not appear that Rule 58 was adopted in response to unfavorable experience with employee absenteeism attributable to participation in political campaigns.

Even if the rule at issue in this case was not racially motivated and would not "have the effect of denying or abridging the right to vote on account of race," the facts presented here are sufficiently suggestive of those possibilities to demonstrate that rules like Rule 58 should be subject to the preclearance requirements of Section 5. With respect to the public employees that they cover, such rules erect substantial barriers to candidacy for and service in political office. They thus directly affect public employees' decisions to

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[4] The United States Commission on Civil Rights, in its 1961 Report—*Voting* (Book 1), commented on the practice of economic retaliation against black teachers involved in attempts to improve black voter registration and participation in the political process. The Report stated (pp. 164, 190):

> A significant aspect of economic retaliation involves Negro teachers—who not only should be qualified to vote, but might be expected to be a source of leadership for the Negro community in general.
>
> * * * * *
>
> * * * In several counties Negro teachers are warned to refrain from taking too active an interest in political matters upon pain of losing their jobs.

The phenomenon described by the Civil Rights Commission is also reflected in reported decisions. See, *e.g.*, *Johnson* v. *Branch*, 364 F. 2d 177 (C.A. 4) (*en banc*), certiorari denied, 385 U.S. 1003, in which a local school board attempted to dismiss a black teacher who had worked in a voter registration drive and helped in the campaigns of her husband and her father for public office.

[5] For an historical discussion of segregation in Albany, Georgia, and a detailed description of the city's racially discriminatory electoral practices, see *Paige* v. *Gray*, 399 F. Supp. 459 (M.D. Ga.), vacated, 538 F. 2d 1108 (C.A. 5), on remand, 437 F. Supp. 137 (M.D. Ga.). Albany is the county seat of Dougherty County and contains approximately 80 percent of the county's population.

seek election and, in turn, the choice of candidates available to the voters. Because of their potential impact on the composition of the ballot, rules like Rule 58 are "standard[s], practice[s], or procedure[s] with respect to voting" within the meaning of Section 5 and they therefore may not be enforced until they have been precleared by the Attorney General or the United States District Court for the District of Columbia.

II

THE DOUGHERTY COUNTY BOARD OF EDUCATION IS A POLITICAL ENTITY WITHIN A STATE COVERED BY SECTION 4 OF THE VOTING RIGHTS ACT AND THEREFORE MUST OBTAIN PRECLEARANCE UNDER SECTION 5 WHEN IT ADOPTS A CHANGE THAT AFFECTS VOTING

In *United States* v. *Board of Commissioners of Sheffield, Alabama, supra*, this Court held that once a state has been designated for coverage under Section 4 of the Voting Rights Act, 42 U.S.C. (and Supp. V) 1973b, the preclearance requirements of Section 5 apply to all voting changes adopted within that state by "political units that may exercise control over critical aspects of the voting process" (slip op. 15). On August 6, 1965, the Attorney General and Director of the Census having made the necessary findings under Section 4(b), Georgia was designated as a covered jurisdiction under the Act.[6] As evidenced

[6] 30 Fed. Reg. 9897. See also *Georgia* v. *United States, supra*, 411 U.S. at 528 n. 1.

by its adoption of Rule 58, appellant Board of Education is a political unit whose actions may directly affect a critical aspect of the voting process, *i.e.*, the potential candidacy of a significant group of public employees. Accordingly, under *Sheffield*, the Board must submit Rule 58 and any other voting changes it adopts for preclearance under Section 5, even though the Board itself does not register voters and therefore is not a "political subdivision" within the definition of that term contained in Section 14(c)(2) of the Act, 42 U.S.C. 1973*l*(c)(2).

Appellants acknowledge, as they must, both the holding in *Sheffield* (Br. 15-16) and the status of the Board of Education as a political unit within a covered state (Br. 14). They contend, however, that because the Board "has no direct or indirect functions in connection with election of public officers" (Br. 15), no action of the Board, even if it constitutes a change in a "standard, practice, or procedure with respect to voting," can be subject to the preclearance requirements of Section 5. Appellants seek to distinguish *Sheffield* on the ground that, unlike the Board of Education in this case, the City of Sheffield does conduct elections and thus plainly exercises "control over the electoral processes" (slip op. 10).

Neither the language nor the legislative history of the Voting Rights Act supports the distinction appellants have attempted to draw. Preclearance under Section 5 is required whenever a political unit within a covered state adopts a change in a "standard, prac-

tice, or procedure with respect to voting." The political unit need not be one that itself conducts elections. No such limitation is explicitly stated in the Act, and none is fairly implied. This Court has properly interpreted Section 5 to give it "the broadest possible scope" (*Allen* v. *State Board of Elections, supra,* 393 U.S. at 567; see also *United States* v. *Board of Commissioners of Sheffield, Alabama, supra,* slip op. 11), and Congress, in its most recent extension of the period during which the Voting Rights Act is to be effective, stated unequivocally that "all changes affecting voting" must be precleared under Section 5. H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 58 (1975). See also the detailed discussion of legislative history in *United States* v. *Board of Commissioners of Sheffield, Alabama, supra,* slip op. 18-24.

Under this Court's decision in *Sheffield,* Section 5 applies to all governmental units "having power over any aspect of the electoral process within designated jurisdictions" (slip op. 6). By providing disincentives to its employees' participation in political campaigns, appellant Board of Education demonstrated and exercised its power over an aspect of the electoral process. If appellants' proposed restriction on the compass of Section 5 were correct and if rules adopted by the Board were not subject to preclearance, political entities within covered jurisdictions could circumvent the requirements of Section 5 simply by delegating legislative and administrative responsibilities for changes affecting voting to political bodies that do

not conduct elections.[7] This Court concluded in *Sheffield* that application of the preclearance procedure only to changes enacted by political units that register voters "would permit the precise evil that § 5 was designed to eliminate" (slip op. 13). Covered states could avoid the necessity for federal preclearance of voting changes by the simple expedient of "allowing local entities that do not conduct voter registration to control critical aspects of the electoral process" (*ibid.*). To an extent perhaps not as great but nonetheless real, if appellants' position in this case were accepted, the consequence would be "to nullify both § 5 and the Act in a large number of its potential applications" (*ibid.*).

Indeed, the primary motivation behind Section 5 was a congressional recognition that, in areas with a history of racially discriminatory voting practices, legislative efforts to eliminate discrimination would almost undoubtedly be met by attempts at evasion or nullification. Congress therefore began by identifying

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[7] Presumably such delegations themselves would be subject to preclearance, and appellants might argue that this initial federal scrutiny would ensure adequate consideration of the interests protected by Section 5. But a transfer of authority from one political unit to another would in all likelihood appear racially neutral on its face. Moreover, it might be comparatively easy to justify on grounds of governmental efficiency. Once approval for such a delegation was obtained, no further submissions under Section 5 would be required, under appellants' theory, because all voting changes would be adopted by an entity that did not itself conduct elections. Such a result is plainly not contemplated by the language, legislative history, or judicial interpretations of Section 5.

certain factors—low registration or voter turnout and prior use of a "test or device" as defined in Section 4(c) of the Act, 42 U.S.C. 1973b(c)—the coincidence of which would indicate a high probability of racial discrimination in a jurisdiction's electoral system. See S. Rep. No. 162, Part 3, 89th Cong., 1st Sess. 14 (1965); Hearings on S. 1564 (Civil Rights: Voting Rights) before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 1477 *et seq.* (1965); *United States* v. *Board of Commissioners of Sheffield, Alabama, supra*, slip op. 8; *South Carolina* v. *Katzenbach, supra*, 383 U.S. at 329-332. In areas satisfying the coverage formula thus produced, Congress then provided not only that no test or device could be used to deprive any person of his right to vote, but also that no change in existing voting practices could be enforced unless first precleared by the Attorney General or the United States District Court for the District of Columbia.

In *South Carolina* v. *Katzenbach, supra*, 383 U.S. at 335 (footnote omitted), this Court explained the circumstances that confronted Congress in 1965:

> Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.

Section 5 was the legislative response to this problem. As the Court observed in *Sheffield* (slip op. 10), "[b]y freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims."

Thus, in enacting Section 5, Congress sought to keep the electoral process free from new forms of discrimination. Whether a particular change in a standard, practice, or procedure with respect to voting is adopted by a political unit that does not itself conduct elections is a consideration essentially irrelevant to the purpose of Section 5. That provision's primary concern is the effect of voting changes on the electoral process, not the identity of the political unit responsible for the change's adoption or enforcement.

A change enacted by a jurisdiction that conducts elections is covered by Section 5 even if the change affects only elections conducted by entities other than the jurisdiction enacting the change. See, *e.g.*, *Pitts* v. *Busbee*, 511 F. 2d 126 (C.A. 5); *Bond* v. *White*, 508 F. 2d 1397 (C.A. 5) (both holding that state enactments affecting only county elections are subject to Section 5). Likewise, a jurisdiction seeking declaratory relief from coverage under Section 4(a) of the Act must demonstrate not only that no discriminatory test or device has been used in its own elections for the past five years, but also that no such test or device has been used during that period in any election con-

ducted by any political unit within the jurisdiction. See, *e.g.*, *Gaston County* v. *United States*, 288 F. Supp. 678, 691 (D. D.C.) (concurring opinion), affirmed, 395 U.S. 285. Appellants do not disagree. Yet, under their interpretation of Section 5, changes affecting another jurisdiction's elections would not be subject to preclearance if the enacting political unit did not itself conduct some elections. There is no justification for this anomalous result.

The applicability of Section 5 in this case should not turn upon peculiarities of state law regarding the method of selecting local boards of education. If appellant Board of Education conducted elections for the purpose of choosing its members or officers, appellants would apparently agree that voting changes adopted by the Board should be submitted for preclearance under Section 5. But because, in accordance with Georgia law (Ga. Code Ann. § 32-902 (1976 Rev.)), appellant Board of Education has been appointed by the Dougherty County grand jury,[8] appellants contend that Section 5 cannot apply. Appellants have pre-

[8] The 1976 Georgia Constitution provides that the grand jury of each county shall appoint the members of the county's Board of Education, unless a local law or local constitutional amendment approved by a majority of the county's voters authorizes election of the Board (see Ga. Code Ann. § 2-5302 (1977 Rev.)). While appellant Board is still appointed by the Dougherty County grand jury, several other Georgia counties have chosen to elect their boards of education. The Section 5 records of the Department of Justice indicate that submissions under Section 5 have been received from such elected boards of education.

sented no evidence that this limited statutory construction comports with congressional intent, and indeed no such evidence exists. If appellants were correct, the City of Sheffield, Alabama, which does conduct elections, would be required to obtain preclearance for a rule curbing the political activities of its employees in the elections of other jurisdictions, but appellant Board of Education's analogous rule would be immune from federal review under Section 5.[9] This arbitrary restriction on the scope of the Voting Rights Act should be rejected.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DREW S. DAYS, III,
Assistant Attorney General.

PETER BUSCEMI,
Assistant to the Solicitor General.

BRIAN K. LANDSBERG,
Attorney.

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[9] Of course, if a private company were to adopt a rule prohibiting or regulating political activity by its employees, such a rule would not be subject to preclearance, because Section 5 applies in terms only to state action.

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